

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeene G. Kelly.

Pinnacle West Capital Corporation	Docket Nos. ER00-2268-014 EL05-10-005
-----------------------------------	--

Arizona Public Service Company	ER99-4124-012 EL05-11-005
--------------------------------	------------------------------

Pinnacle West Energy Corporation	ER00-3312-013 EL05-12-005
----------------------------------	------------------------------

APS Energy Services Company, Inc.	ER99-4122-015 EL05-13-005
-----------------------------------	------------------------------

ORDER GRANTING REHEARING AND APPROVING SETTLEMENT

(Issued April 28, 2006)

1. This order grants the rehearing requests submitted by Arizona Public Service Company (APS) and the Arizona Districts¹ of the Commission's December 22, 2005 order.² As discussed below, we will approve the settlement between APS and Arizona Districts submitted on April 11, 2005.

¹ The Arizona Districts are Aguila Irrigation District, Buckeye Water Conservation & Drainage District, Electrical District No. 6 of Pinal County, Electrical District No. 7 of Maricopa County, Electrical District No. 8 of Maricopa County, Harquahala Valley Power District, Maricopa County Municipal Water Conservation District No. 1, McMullen Valley Water Conservation & Drainage District, Roosevelt Irrigation District and Tonopah Irrigation District.

² *Pinnacle West Capital Corp.*, 113 FERC ¶ 61,309 (2005) (December Order).

Background

2. On April 11, 2005, the Pinnacle West Companies³ filed an offer of settlement and settlement agreement between APS and the Arizona Districts. The Pinnacle West Companies stated that the settlement resolved all of the market power issues that the Arizona Districts raised in their protest in *Pinnacle West Capital Corp.*, Docket No. ER00-2268-003, *et al.*, (*Pinnacle West* Proceeding). The Arizona Districts sought an extension of services currently provided under certain Wheeling and Administrative Service Agreements (Wheeling Agreements) and the Market Rate Tariff No. 1 Service Agreement between APS and the Arizona Districts that were going to terminate on December 31, 2005.

3. Under the settlement, APS and the Arizona Districts agreed to new contracts (service agreements) under APS' Market Rate Tariff No. 1. The Pinnacle West Companies stated that each service agreement was between APS and one of the ten Arizona Districts, with prices based on a comparable retail, cost-based rate. The settlement provided that the contracts subject to the settlement superseded the existing wholesale agreements between APS and the Arizona Districts as of January 1, 2006. The new service agreements provided long-term (15-year) power supply and delivery arrangements to replace the agreements that expired on December 31, 2005.⁴ Under the terms of the settlement, the service agreements could not take effect until the Commission approved the settlement.

4. APS filed notices of cancellation of the Wheeling Agreements that APS and each Arizona District entered into between 1986 and 1994 and a notice of cancellation of the Market Tariff Service Agreement between APS and the Arizona Districts. The notices of cancellation stated that the cancellations would become effective December 31, 2005.

5. In the December Order, the Commission rejected the settlement and the filing of the accompanying service agreements as unnecessary.⁵ The Commission explained that under its regulations it was not necessary to file these service agreements because public utilities "shall" not file with the Commission market-based rate agreements that they

³ The Pinnacle West Companies are Pinnacle West Capital Corporation, Arizona Public Service Company, the Pinnacle West Energy Corporation, and APS Energy Services Company, Inc.

⁴ Arizona Districts Rehearing at 4.

⁵ December Order, 113 FERC ¶ 61,309 at P 11.

negotiate under their market-based rate tariffs.⁶ The Commission noted that the issue of whether APS could continue to charge market-based rates was pending before the Commission in the *Pinnacle West* Proceeding, but in the meantime, APS' market-based rate authorization remained in place.⁷ The Commission observed that the market-based rates that APS negotiated with the Arizona Districts were subject to refund pending the outcome of that proceeding.⁸ Finally, the Commission accepted the notices of cancellation of the pre-existing wheeling agreements between APS and each Arizona District, and the notice of cancellation of the Market Tariff Service Agreement between APS and the Arizona Districts, effective December 31, 2005, as, by their own terms, these agreements expired on that date.⁹

⁶ *Id.* at P 11 citing 18 C.F.R. § 35.1(g) (2005). *See also Public Utility Filing Requirements*, Order No. 2001, 67 Fed. Reg. 31,043 (May 8, 2002), FERC Stats. & Regs. ¶ 31,127 (2002) (Order No. 2001).

⁷ *Pinnacle West Capital Corp.*, 109 FERC ¶ 61,295 (2004) (*Pinnacle West* Proceeding) (Commission instituted a proceeding under section 206 of the Federal Power Act, 16 U.S.C. § 824e (2000) (FPA) to determine whether the Pinnacle West Companies may continue to charge market-based rates and established a refund effective date). In a subsequent order, the Commission revoked the market-based rate authority of Pinnacle West Companies in the APS control area. *Pinnacle West Capital Corp.*, 115 FERC ¶ 61,055 at P 5 (2006) (April 17 Order).

⁸ December Order, 113 FERC ¶ 61,309 at P 12 and n.11 citing *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004) (July 8 Order).

⁹ December Order, 113 FERC ¶ 61,309 at P 11-13. The Yavapai-Apache Energy Office (YAE0) filed a motion to intervene and comments on the settlement. The thrust of YAE0's comments was that, in the settlement, APS was allowing the Arizona Districts to use secondary metering and load profiling, which APS had refused to make available to YAE0. As the Commission rejected the settlement, it did not reach YAE0's arguments regarding discriminatory treatment, the use of primary (as opposed to secondary) meters, and the availability of load profiling. The Commission did observe, however, that if YAE0 believed that APS was treating it in an unduly discriminatory manner, it could file a complaint with the Commission under section 206 of the FPA. YAE0 did not seek rehearing of the December Order.

6. On January 20, 2006, APS and the Arizona Districts (jointly, the parties) filed timely requests for rehearing of the December Order. They argue that the Commission should grant rehearing and approve the settlement between APS and Arizona Districts and the service agreements contained in the settlement. Arizona Districts argue that these are essentially agreements with cost-based rates similar to rates they would receive if the Commission ordered mitigation in the *Pinnacle West* Proceeding.¹⁰

7. On April 17, 2006, the Commission issued an order that, among other things, revoked Pinnacle West Companies' market-based rate authority in the APS control area.¹¹ The Pinnacle West Companies were directed to file a separate tariff to provide for the default cost-based rates as specified in the April 14 Order,¹² to be effective as of the refund effective date in this proceeding (*i.e.*, February 27, 2005). The companies were also directed to provide cost support for these rates. In addition, the cost-based filing was directed without prejudice to the Pinnacle West Companies' ability to propose tailored mitigation that would apply prospectively or to make sales under its existing Commission-approved cost-based rate tariffs. The Commission found that the revocation of the Pinnacle West Companies' market-based rate authority in the APS control area does not apply to, or affect, existing market-based rate contracts that were entered into prior to the refund effective date in this proceeding.¹³

Requests for Rehearing

8. The Arizona Districts argue that the Commission erred in rejecting the settlement between APS and the Arizona Districts because: (1) the December Order failed to acknowledge that the settlement resolved the market power issues raised by the Arizona Districts in their protests of APS' market-based rate filing by providing the Arizona Districts with new cost-based power contracts that were to replace the expiring market-based rate agreements; (2) the December Order failed to acknowledge that the settlement reduces litigation costs by resolving disputes in the market-based rate case and promotes judicial economy; and (3) the incorporation by reference of the service agreements in the settlement does not warrant the rejection of the settlement.¹⁴

¹⁰ Arizona Rehearing at 6.

¹¹ April 17 Order, 115 FERC ¶ 61,055 at P 5.

¹² 107 FERC ¶ 61,018 at P 151-55.

¹³ April 17 Order, 115 FERC ¶ 61,055 at n.5.

¹⁴ Arizona Districts' Statement of Issues at 2.

9. APS argues that the Commission erred in rejecting the settlement between APS and the Arizona Districts because: (1) the approval of the settlement in its entirety was an essential part in resolving the issues in this proceeding and the Commission's rejection exposes the parties to risks that the settlement was designed to eliminate; (2) the rejection is inconsistent with the Commission's policy favoring settlements; and (3) the Commission incorrectly treated the service agreements as being submitted for filing as rate schedules, instead of as part of the settlement package.¹⁵

10. On April 24, 2006, the Arizona Districts submitted an emergency motion for expedited consideration of their January 20, 2006 rehearing request. They argue that as a result of the Commission's rejection of their settlement with APS and the service agreements that were part of the settlement the Arizona Districts will be without a power supply contract on May 1, 2006. Since the existing agreements expired on December 31, 2005, and the parties' interim 120-day power supply agreement expires on April 30, 2006, they urge the Commission to accept the settlement.

Discussion

11. Upon further consideration and in light of subsequent developments, we find the settlement fair and reasonable and in the public interest, and thus grant rehearing and approve the settlement. The Commission's approval of this settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding.

The Commission orders:

(A) The requests for rehearing are hereby granted, as discussed in the body of this order.

(B) The settlement between APS and the Arizona Districts is hereby approved, as discussed in the body of this order.

By the Commission. Commissioner Kelly dissenting in part with a separate statement attached.

(S E A L)

Magalie R. Salas,
Secretary.

¹⁵ APS' Statement of Issues at 1-2.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Pinnacle West Capital Corporation Docket Nos. ER00-2268-014
EL05-10-005

Arizona Public Service Company ER99-4124-012
EL05-11-005

Pinnacle West Energy Corporation ER00-3312-013
EL05-12-005

APS Energy Services Company, ER99-4122-015
Inc. EL05-13-005

(Issued April 28, 2006)

KELLY, Commissioner, *dissenting in part*:

Although I agree with this order's approval of the Settlement and associated Service Agreements, as I have previously set forth in *Wisconsin Power & Light Co.*, 106 FERC ¶ 61,112 (2004), I do not believe that the Commission should depart from its precedent of not approving settlement provisions that preclude the Commission, acting *sua sponte* on behalf of a non-party, or pursuant to a complaint by a non-party, from investigating rates, terms and conditions under the "just and reasonable" standard of section 206 of the Federal Power Act at such times and under such circumstances as the Commission deems appropriate.

Therefore, I disagree with this order to the extent it accepts for filing a settlement and related service agreements that provide, in relevant part that the standard of review for any modifications that are not agreed to by the parties, including any modifications resulting from the Commission acting *sua sponte*, shall be the 'public interest' standard under the Mobile-Sierra Doctrine.

	_____ Sudeen G. Kelly
--	--------------------------